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Systemic Discrimination: Regulation 8 - Family Benefits Act: Policy of Reasonable Efforts to Obtain Financial Resources

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SYSTEMIC DISCRIMINATION: REGULATION 8— FAMILY BENEFITS ACT: POLICY OF REASONABLE EFFORTS TO OBTAIN FINANCIAL RESOURCES

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The Social Assistance Review Committee's report noted that the subject of discretionary decision making in the province's social assistance system elicited extensive criticism among many who appeared before or submitted briefs to the Committee.[1] This paper examines one specific social assistance policy that has allowed for a considerable degree of discretion in its application.

This paper describes a systematic review of the application of section 8 of the *Family Benefits Act Regulations*[2] (hereinafter *Regulation 8*) which allows for financial deductions from the basic income of recipients. It documents both the inappropriate application of *Regulation 8* and the resulting adverse impact upon racial minority recipients of family benefits. The findings of this review provide persuasive evidence of systemic discrimination, on the basis of race, in the application of *Regulation 8* deductions from the allowance of family benefits recipients.

The first section of this paper provides a brief overview of the policy developed by the Ministry of Community and Social Services (hereinafter the Ministry) for *Regulation 8*, and the methodology and findings of the study. The second section examines the application of *Regulation 8* in a larger context, reviewing some of the relevant literature on discrimination and the contemporary legal understanding of systemic

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1. Ontario, *Report of the Social Assistance Review Committee: Transitions* (Toronto: Queen's Printer, 1988) (Chair: George Thomson) at 350.

2. R.R.O. 1980, Reg. 318 section 8 states that:

> "Where the Director is not satisfied that an applicant or recipient is making reasonable efforts to obtain compensation or realize any financial resource that the applicant, recipient,... may be entitled to or eligible for... the Director may determine that the applicant, recipient,... is not eligible for a benefit or may reduce the amount of an allowance granted by the amount of the compensation, contribution or financial resource, as the case may be, that in his opinion is available to the applicant, recipient,...".

discrimination. The concluding section describes the response of the Ministry and the Ontario Human Rights Commission to this study.

While this paper describes a study that is specific to a particular policy, it may provide a methodology for the investigation and review of other policies which allow for the exercise of considerable discretion in the delivery of social services and benefits. This systemic approach reveals issues that are not apparent in a case by case approach and offers a strategy to shift a rather onerous burden from individual claimants to institutional bureaucrats.

BACKGROUND

The Ministry of Community and Social Services is the provincial ministry responsible for the design and delivery of social and financial assistance programs to eligible Ontario residents. While it is the provincial legislature that is responsible for enacting the enabling legislation, it is the specific ministry that is responsible for implementing these legislative statutes through appropriate policies and procedures.

The specific programme that involves the policy of *Regulation 8*, is the Family Benefits Income Maintenance Program. This program provides income support to individuals who have no other adequate source of income. Approximately 130,000 individuals and families in this province are recipients of financial assistance under this program. A large majority of these recipients are sole support mothers with dependent children. It is this group that was the focus of the study since they are the group that is most affected by the application of *Regulation 8*.

Regulation 8 allows for a reduction in an applicant/recipient's family benefits allowance should the Ministry determine that an applicant or recipient is not making a reasonable effort to obtain a potential financial resource. The amount of this reduction, according to *Regulation 8*, should be based on what the Ministry determines would be available to the applicant/recipient had they pursued this potential support.

A single parent, with dependent children, applying for or receiving family benefits is required to actively pursue support from the other parent, where this is possible and desirable. The Ministry waives support, either temporarily or permanently, in situations where it is not advisable for the recipient to pursue support: for example the absent parent is physically or otherwise abusive, or the absent parent is unemployed and in receipt of general welfare assistance.

The Ministry's *Guidelines* and procedures provide some direction, based upon individual fact situations, for assessing and determining whether support requirements should be waived or whether a *Regulation 8* charge should be invoked against a recipient's benefits.[3]

These *Guidelines* provide certain criteria to assist supervisors and workers in assessing the appropriateness of a *Regulation 8* charge or the waiver of support. These are:

1.) The Ministry must be satisfied that the client does in fact not know the identity of the other parent. The client's answers will determine the form of the recommendation and decision.

2.) The Ministry must determine why the client refuses to name the other parent. The client's answers will determine the form of the recommendation and subsequent decision.

3.) It is the Ministry's responsibility to establish why the client refuses to pursue support. The spectrum of recommendations/decisions possible is broad. a) Grant benefits with a reduction under Section 8 of the Reg. b) Grant benefits without a reduction under Section 8 of the Reg. c) Waive support requirements.[4]

In cases where the absent parent's whereabouts is unknown the guidelines indicate that an absent person report, must be completed and referred to the Desertion Services Unit in an effort to establish the other parent's whereabouts. The assumption is that the recipient will pursue support once the absent parent's whereabouts is established. A *Regulation 8* charge should not be considered in this kind of situation.

The procedural *Guidelines* provide little guidance on what circumstances should be relevant to determine the amount of a *Regulation 8*

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3. See the *Family Benefits Policy and Procedural Guidelines* (Toronto: Income Maintenance Branch - Ministry of Community and Social Services) [hereinafter the *Guidelines*] at Index Number 8, dated 3/85, at 2. During the time this study (January 1988) was conducted, politices on *Regulation 8* were referenced under the following secions of the *Guidelines:* Index Numbers 6 (91/82), 7 (12/88), 8 (3/85) under the heading 'Child Born out of Wedlock', 9 (12/84), and 18 (3/85). These are now referenced under Index Numbers: 6 (10/89), 8 (12/88) under the heading 'Whereabouts of Other Party Unknown', 9 (12/84), and 18 (10/87).

4. *Ibid.* Index Number 8, date 3/85, at 2 [now Index Number 8, date 12/88, at 6, 9, 11]

charge. The *Guidelines* state that if a charge is indicated: "the value of such a reduction should be determined based on the individual circumstances of the case."[5]

It is the application of this *Regulation 8* charge: both the decision to apply the charge and the determination of the amount, that is the subject of the study that is described in this paper. Specifically, the study examines the disparate impact upon racial minority recipients that results from this decision making process.

The *Regulation 8* review and subsequent study came about as a result of an office reorganization. The review was initiated by this author who, at the time of this study, was a fieldworker at the Ministry. I had been recently reassigned from one geographical area to a caseload in another geographical area in Metro Toronto. In the course of interviews with recipients I became aware of not only a pattern and practice of inappropriate *Regulation 8* deductions, but also the apparent disproportionate number of racial minority women who were affected by these charges.

QUANTITATIVE ANALYSIS OF REGULATION 8 DEDUCTIONS

FIRST CASELOAD REVIEW

This review was conducted in January 1988 and was based on the data obtained from one caseload covering a geographical area serviced by a family benefits office in Metro Toronto. This caseload review examined specifically the group known as mothers with dependent children. At the time of this study this category included several case classifications: single, deserted, separated, divorced, and mother other. These Ministry case classifications comprise the large majority of the total caseload: 311 mothers from a total caseload of 365.

The remaining 54 cases from this caseload were excluded from this review. These cases consisted of the following classifications: single father, dependent father, disabled wife with children, foster parent, disabled married, permanently unemployable, aged, and widow. While some of these classifications could potentially be affected by *Regulation 8* charges, they seem to occur far less frequently and indeed no charges were made against any of these 54 cases in this caseload.

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5. *Supra,* note 4, 12/88, at 5 [now at 13-14].

Seventeen of the 311 mothers with dependent children had *Regulation 8* charges against their grants in January 1988. All 311 cases were identified according to their Ministry case classifications. All cases were identified according to whether they: (1) were receiving support payments directly from the absent parent or (2) had assigned support payments to the Ministry or (3) were not receiving support either directly or indirectly from the absent parent. All 311 mothers with dependent children were identified according to race, either white or racial minority. Racial minorities included Black, East Indian, Oriental, and Native women. Fieldworker observation was the method used for racial identification.

All cases where a *Regulation 8* charge was applied were identified. The actual dollar amount of the charge was identified, and the percentage of the basic grant was calculated. The basic needs does not include shelter allowance. A particular statistical procedure, cross tabulation and resulting chi-square statistic was used to test for the significance of race in the application of *Regulation 8* charges and in the amount of these charges. The computer program SPSSPC was used for this analysis.

FINDINGS

Table 1 shows the breakdown by race of the 311 recipients who are single mothers with dependent children.

TABLE 1. CASELOAD DISTRIBUTION BY RACE

RACE	# Of Cases	% Of Cases
White	210	67.5%
Racial Minority	101	32.5%

- Approximately 2/3 of the 311 recipients in this caseload review were white recipients, only 1/3 were racial minority recipients.

Of the 311 cases 5.5% (17) had varying amounts deducted from their basic allowance grant due to the application of a *Regulation 8* charge. However, as Table 2 illustrates, racial minority recipients were disproportionately represented among those recipients who had *Regulation 8* deductions made against their allowance.

TABLE 2. CROSS TABULATION OF REGULATION 8 CHARGES BY RACE OF RECIPIENT

RACE	Count Exp Value Row Percentage Col Percentage	WHITE	RACIAL MINORITY	Row Total
Regulation 8				
NO		205 198.5 69.7% 97.6%	89 95.5 30.3% 88.1%	294 94.5%
YES		5 11.5 29.4% 2.4%	12 5.5 70.6% 11.9%	17 5.5%
	Column Total	210 67.5%	101 32.5%	311 100.0%

- The above numbers illustrate the disproportionately high number of racial minority recipients having *Regulation 8* charges deducted from their grant and are statistically significant at the .001 level. The probability of these results occurring due to chance is one out of one thousand. This means that one can safely conclude these results are not due to chance but that there is indeed a relationship between race and the likelihood of a *Regulation 8* charge being applied.
- While racial minority recipients comprise only 1/3 of this caseload, they comprise over 2/3 (70.6%) of the recipients who have *Regulation 8* charges brought against them.
- While 2% of the total white population had *Regulation 8* charges, 12% of the racial minority population had *Regulation 8* charges brought against them. Therefore, assuming this caseload is representative of most of the Metro Toronto area caseloads, racial minorities are 6 times more likely than whites to have *Regulation 8* charges brought against them.

While Table 2 documents the disproportionate occurrence of *Regulation 8* charges against racial minorities, Table 3 shows an equally disturbing pattern. Racial minorities, as a group, had higher deductions made from their grants than did white recipients, as a group.

TABLE 3. AVERAGE MONTHLY AMOUNT AND PERCENT OF BASIC GRANT DEDUCTED BY RACE

	Amount Deducted	Percentage of Grant Deducted
	Mean	Mean
RACE		
White	$44	7%
Racial Minority	$62	10%

- Both in absolute and relative terms, racial minorities had higher amounts deducted from their basic grant.
- Even though the average number of children was almost equal for both groups (2.67 for racial minorities, 2.60 for whites), higher deductions were made from the grants of racial minorities.
- This disparity in amounts translates into very real negative consequences for the racial minority children on this caseload:

  32 racial minority children have an average of $278 per child deducted annually.

  13 white children have an average of $202 per child deducted annually.

The variation by race in the application of *Regulation 8* charges could not be accounted for by differences between the two groups in their ability to obtain support maintenance payments from the absent father. Table 4 presents the variation by race in the receipt and non receipt of support payments.

TABLE 4. RECEIPT VERSUS NON-RECEIPT OF MAINTENANCE PAYMENTS BY RACE

	RACE	
	WHITE	RACIAL MINORITY
MAINTENANCE		
None	51% (107)	58% (59)
Assigned/Direct Receipt	49% (103)	42% (42)

- The above numbers and percentages illustrate the variation among white and racial minorities who had support payments either assigned directly to the Ministry or received direct payments, and those who did not.
- There is no statistically significant difference between these two groups in their ability to obtain maintenance payments (probability = .26). This means that the observed variation could be related to random chance, and that race was not statistically significant.

One can infer that some sort of judgement is being made about white and racial minority recipients' willingness or ability to pursue maintenance. Racial minority recipients were more often deemed able, but unwilling to pursue support payments.

While 11 of these 17 women reported to the Ministry that the absent parent's whereabouts were unknown, *Regulation 8* charges were still applied to their grants. In only 3 of these 11 cases was the absent person report completed and referred to the Desertion Services Unit in an attempt to locate the absent parent. In the three cases where a referral was made to Desertion Services Unit, it was unable to locate the absent parent, *however the Regulation 8 charges remained.*

In 2 of the 17 cases, the absent parent was reported to be residing in a country where there is no reciprocal agreement with the Canadian courts; yet, *Regulation 8* charges were applied. In one case the recipient had already obtained a court order and assigned maintenance directly to the Ministry; still, the *Regulation 8* charge remained for several years after the support was assigned.

One might wonder why none of these recipients sought to have these obviously unfair deductions removed from their grant. The following data indicate that, contrary to Section 13(4) of the *Family Benefits Act*,[6] the majority of these recipients were not notified of these deductions, let alone of their right to appeal.

Of the 17 cases where a *Regulation 8* charge was made, 11 recipients were not advised by the Ministry either in writing or verbally that a charge was being made against their benefits. In only 2 of the remaining 6 cases were the recipients advised of their right to appeal.

Shortly after this review I recommended that all *Regulation 8* charges on these seventeen[7] cases be removed. A majority of these recipients received full retroactive payment based on the inappropriateness of the *Regulation 8* charge.

SECOND CASELOAD REVIEW

A partial review of a second caseload client population revealed similar disparate outcomes as those found in the first caseload. This second review was based on data obtained from another caseload which covers a different geographical area also serviced by the same family benefits office.

The second caseload had over 400 recipients that included most, if not all case classifications. This caseload was not separated by classification, nor was the proportion of whites and racial minorities identified for the total caseload. However recipients who had *Regulation 8* charges applied against their benefits were identified by race.

In this caseload, 21 cases had varying amounts deducted from their basic allowance grant due to the application of a *Regulation 8* charge. Racial minorities were also disproportionately represented. We are assuming the ratio of whites to racial minorities in this caseload population was generally similar to the distribution by race of the total client population in the first caseload.

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6. R.R.O. 1980, c. 151, s.13(4) states that: "Where the Director varies the amount of any allowance or benefit, he shall give notice of such variation, together with his reasons therefor, to the recipient."

7. Actually the recommendation extended to 19 cases when all were submitted since 2 additional cases were transferred to me the month following this study. It is interesting to note that these 2 cases involved racial minority recipients.

Of these *Regulation 8* cases, *38%* (8) occurred against the benefits of white recipients and *62%* (13) occurred against the benefits of racial minority recipients. These percentages illustrate the disproportionately high number of racial minority recipients having *Regulation 8* charges deducted from their grant. It appears that in this caseload there was also a strong relationship between race and the likelihood of a *Regulation 8* charge being applied.

As with the first caseload, racial minorities also had far greater deductions made from their grants than did white recipients as a group.

TABLE 5. AVERAGE MONTHLY AMOUNT AND PERCENT OF BASIC GRANT BY RACE

RACE	AMOUNT DEDUCTED	% DEDUCTED
White	$48.75	8%
Racial Minority	$75.00	12%

- Both in absolute and relative terms, racial minorities had higher amounts deducted from their basic grant.

While one may be tempted to dismiss these findings as simply an anomaly of an individual caseload or geographical area, the data refutes this kind of speculation. The distribution by race among the 17 *Regulation 8* cases, in the first review, and the 21 *Regulation 8* cases, in the second review, cannot be explained by simply isolating individual factors. Individual supervisors, individual workers, and geographical area, will not on their own account for the obvious unequal distribution in the frequency and amount of *Regulation 8* charges against racial minority recipients.

The fact that these cases were assigned to a specific family benefits office at the time of this study does not imply that they were assigned to this same office at the time the *Regulation 8* charges were applied against these women's benefits. Rather the application of these *Regulation 8* charges covers a long period of time and cuts across many geographical areas and Metro Toronto offices with varying Ministry personnel involved in the decisions.

This review alleges that the *Regulation 8* policy and current practice has an adverse effect on a protected group that is disproportionate as compared with the effect of this policy on others. The quantitative findings support this allegation. This is not to say that white recipients are not also harmed by a practice that results in arbitrary and inappropriate decisions which impact directly upon them and their children.

At a broader level, in allowing for this punitive practice by way of institutionalizing it as part of policy, the Ministry participates and legitimizes the increased impoverishment of all of these women. The secondary affect is that while this policy or practice impacts upon all women, the women most seriously harmed are racial minority women.

CONCEPTUAL FRAMEWORK: SYSTEMIC DISCRIMINATION

The key conceptual issue in the *Regulation 8* study is systemic discrimination. While there have been a variety of definitions and understandings about the meaning of this term, it is the use of the term in the contemporary legal and equal opportunity context that is relevant to this study. The concept of systemic discrimination, or of a systemic approach to discrimination, refers to a type of discrimination that occurs "whenever a policy or practice has an adverse effect on a protected group that is disproportionate as compared with the effect of the policy on others."[8] The *Ontario Human Rights Code*, Section 10, specifically refers to this type of discrimination as illegal except where "the requirement, qualification or factor is reasonable and *bona fide* in the circumstances."[9] Unlike other claims of discrimination on the basis of a prohibited ground, the allegation of adverse effect or disparate impact does not require a showing of *intent* to discriminate. The discriminatory consequences may or may not have been foreseen. All that is necessary is proof that the disparate impact on a protected group has occurred as a result of a particular policy or practice and that the policy or practice is not viewed by the plaintiff as reasonable or *bona fide.*

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8. W.W. Black, *Employment Equality: A Systemic Approach* (Ottawa: Human Rights Research and Education Centre, University of Ottawa, 1985) at 128.

9. S.O. 1981, c. 53.

This broadened interpretation of discrimination is relatively new to Canada but there is sufficient evidence, both in terms of legislative statutes and governmental activity, to indicate that this expanded approach to ensuring equality in Canadian society is becoming a matter of important public policy. The Abella Commission report made clear its position on this expanded understanding of discrimination:

> "Formerly, we thought equality only meant sameness and that treating persons as equals meant treating everyone the same. We now know that to treat everyone the same may be to offend the notion of equality. Ignoring differences may mean ignoring legitimate needs.... Ignoring differences and refusing to accommodate them is a denial of equal access and opportunity. It is discrimination."[10]

An important aspect of this systemic approach to discrimination is that it "is primarily concerned with groups rather than individuals" and it "focuses on the effects of a policy rather than on the motivation that gave rise to it."[11] Given this focus "the key to this theory is statistical evidence concerning the proportion of members of the group who are adversely affected as compared with the proportion of those who are not members of the group and are adversely affected."[12]

IMPACT ON RACIAL MINORITIES

While quantitative analysis allows us to understand whether there is an adverse impact, it will not show how or why this is occurring. In the specific case of the *Regulation 8* policy and its application, it is not possible to determine *a priori* whether an observed disproportionate outcome is due to the policy, itself, or to a discriminatory use of administrative discretion in its application. While an administrative review of the *Regulation 8* cases cited in the study determined that all of the charges were inappropriately applied, this review did not address the question of why there was such a disparate impact on racial minorities resulting from these inappropriate decisions.

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10. Canada, *Report of the Commission on Equality in Employment* (Ottawa: Queen's Printer, 1984) (Chair: R. Abella) at 3.

11. *Supra*, note 8 at 138–139.

12. *Ibid.* at 128.

Based upon the interpretation and past practice regarding the application of the *Regulation 8* policy there are several possible reasons for a resulting disparate impact on racial minority recipients:

(1) In the case where a recipient claims the absent parent's whereabouts are unknown or resides in a jurisdiction where there is no reciprocal court agreements, the policy directs that a *Regulation 8* charge should not be applied. The one possible implied exception would be where the caseworker and/or supervisor does not believe the truth of the recipient's assertion. Perhaps racial minority recipients' assertions are more often suspect.

(2) In the case where the recipient states that the identity of the putative father is unknown and this assertion is not given credence, there is an implied right in the policy to apply the *Regulation 8* charge. Perhaps in this case, as in the one above, racial minority recipients' assertions are believed less often.

(3) In the case where the caseworker ascertains or implies the reason for a recipient's unwillingness and/or inability to apply for a court order of support or attend subsequent hearings and the caseworker and/or supervisor determine that the reason is not valid, a *Regulation 8* charge may be applied. Perhaps racial minority recipients' stated or implied reasons are more often determined not to be valid.

In the case of the first two suggested explanations, neither one could constitute a legally, sustainable defense for the adverse impact. In both instances there would have to be some objective basis for the determination that the recipients were not credible. In the first instance a minimum requirement would be that an absent parent report had been filed with the Desertion Services Unit, a reasonably competent search had been conducted, the results showed that the absent parent had been located, the recipient had been advised of this and did not apply for a support order. It is unclear if any defense could be mounted in the second instance.

The third possible reason cited above is the most complex. It is possible that the reasons stated by racial minority recipient's or implied by caseworkers/supervisors do systematically vary by race. The significant issue then becomes why these reasons are more often determined not 'valid.' This may involve policy issues rather than simply staff application of the policy.

CASE LAW: EMPLOYMENT DISCRIMINATION

Conceptions of discrimination have evolved and expanded over time. D.R. Phillips[13] in reviewing the development of Canadian legislation and jurisprudence, notes that "until well into the 1960's Canadian courts could find no Common Law prohibition against discrimination." As recently as 1985 Black also was contending that "systemic discrimination still has not been fully accepted in Canada."[14]

Much of the contemporary Canadian understanding and legal definitions of discrimination has been influenced by United States legal jurisprudence. While most legal jurisprudence regarding discrimination is limited to employment discrimination, it does provide a useful model and/or framework for analyzing and measuring other types of discrimination.

It was the United States Supreme Court, in Griggs v. Duke Power Co. (1971), 401 U.S. 424, 915 Sup.Ct. 849, who first enunciated the 'disparate impact' concept of discrimination. This was a marked shift in the legal approach to proof of discrimination. The Court no longer required a showing of discriminatory intent but rather only proof of the disparate impact of discriminatory practices.[15]

The Canadian Supreme Court has adopted the same standard in determining sufficient proof for a finding of discrimination. This Court's decisions in *Bhinder & the Canadian Human Rights Commission & the Canadian National Railway Co.*,[16] and the *Ontario Human Rights Commission & O'Malley & Simpsons Sears Ltd.*[17] are as important in Canada as the *Griggs* decision is in the United States. In most Canadian jurisdictions a *prima facie* case of employment discrimination can now be established through the use of adverse impact evidence. As a result of these two Canadian cases aggregate statistical evidence has become critically important in establishing and rebutting *prima facie*

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13. Canada, *Equity in the Labour Market: The Potential of Affirmative Action – Equality in Employment. A Royal Commission Report* by D.R. Phillips, (Ottawa: Canadian Government Publishing Centre, 1985) at 51.

14. *Supra*, note 8 at 126.

15. M.J. Zimmer, C.A. Sullivan & R.F. Richards, *Cases and Materials on Employment Discrimination* (Boston: Little, Brown, and Co. 1982) at 131.

16. (1985), 7 C.H.R.R. D/488.

17. (1980), 2 C.H.R.R. D/57.

cases of employment discrimination. In order to establish a *prima facie* case of discrimination:

> "[T]he plaintiff has to present through statistical evidence that a facially neutral practice or rule has a disparate impact upon a protected group, that is, (in the *Griggs* case) that the pattern of hiring or promotion of a protected group differed from that of the majority group."[18]

A number of Canadian cases have been decided based on the analysis and assessment of statistical data presented at hearings before the Canadian Human Rights Commission. Evidence showing statistical disparities in dismissal rates was decisive in *Ingram v. Natural Footwear.*[19] In *Offierski v Peterborough Board of Education*[20] the number of women employed in a particular job was compared to the number of qualified women in the labour market. In *Action Travail des Femmes and Canadian Human Rights Commission v. Canadian National Railway Company*[21] long standing statistical disparities between the percentage of female employees at Canadian National compared to the percentage of females in the Canadian workforce, were held by the Court to be evidence of discriminatory employment practices.[22]

As a result of these and other rulings regarding adverse impact two issues are seen as central in assessing statistical evidence to establish *prima facie* evidence of systemic discrimination. These are 1) what has been compared to what? Some courts have compared the percentage of a protected group of employees with the percentage of that protected group in the general population, (a population/workforce comparison); and 2) whether the evidence of the impact is sufficiently damaging to be practically or legally significant.[23]

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18. A. Vining, D. McPhillips & A. Boardman, "Use of Statistical Evidence in Employment Discrimination Litigation," Affirmative Action Management, (Canada, 1986) at 667.

19. (1980), 1 C.H.R.R. D/13.

20. (1980), 1 C.H.R.R. D/7.

21. (1984), 5 C.H.R.R. D/2327.

22. *Supra*, note 18 at 698.

23. *Ibid.* at 667.

LITERATURE REVIEW: OTHER DISCRIMINATION

Prohibited grounds of discrimination under Canadian Federal and Provincial Human Rights Statutes are not limited to labour market inequalities, but also cover other areas such as housing, goods and services, credit, and educational and training opportunities. Several research studies have focused on discrimination in areas other than employment. The following review of current literature examines the impact of discrimination on protected groups.

In Phillips' Royal Commission Report on *Equality in Employment*, several contributors in their research describe how discrimination manifests itself in the treatment of racial minority women.[24] Buckland examines the inequalities that affect women, disabled persons, native people, and visible minorities and how they are related to the larger socio-economic structure.[25] For women, particularly racial minority women, the interaction of several factors such as those related to low socio-economic status due to labour market inequities, limited access to educational programs, and few child care support systems create additional barriers that only compound the disadvantaged position of these groups. The serious economic disadvantage of these groups seen, in "higher rates of unemployment, higher rates of need for social assistance," form a structural basis for further disadvantage. For racial minority women discriminatory treatment on the basis of race could only exacerbate these barriers.

Visible minorities in Canada perceive discrimination as a highly significant problem. Lampkin discusses the perceptions of visible minorities about the impact of discrimination on their lives.[26] The principle areas where discrimination occurred were identified as employment, housing, education, training and access to services. In the specific context of delivery of services by social agencies, visible minorities perceived staff in these agencies to be "totally unprepared for dealing with the multicultural society. The need for increased services to ethnic populations was viewed as low in priority of demands on agency

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24. *Supra*, note 13.

25. L. Buckland, "Education and Training: Equal Opportunities or Barriers to Employment?" in D.R. Phillips, *supra* note 13 at 144.

26. L. Lampkin, "Visible Minorities in Canada" in D.R. Phillips, *supra* note 13.

resources."[27] Staff of social agencies were often seen to identify visible minorities as having 'personal problems' to explain socio-cultural phenomena. "The welfare system was of particular concern to some groups who viewed it as creating shame and dependency."[28]

The *Transitions* Report released by the Ontario Social Assistance Review Committee described significant problems with the present social service system in meeting the needs of various multicultural groups in the province:

> "The present system falls short of providing sensitive support, services and opportunity to those of all cultures and religious beliefs. Staff are insufficiently trained to understand and respond to the needs of minority groups. Existing rules can have a devastating effect on immigrants."[29]

Commenting on the unfairness of the present system, the Social Assistance Review Committee also notes that:

> "The present social assistance system is highly complex, adversarial in its approach, stigmatizing, and inequitable. Many of its rules and procedures violate basic individual rights and principles of fairness. The emphasis upon categorical distinctions between recipients and the high degree of discretion exercised by staff, means that significant disparities exist in the help available to people in similar situations."[30]

Cook and Watt describe the 'low take up' of benefits among racial minority women who are in receipt of public assistance in Britain.[31] The authors cite studies showing that while many poor people are not receiving full benefits, particularly discretionary benefits, "underclaiming by black people is higher than it is for white people."[32] The authors attributed these results to barriers created by lack of information and the complexities of the public assistance system.

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27. *Supra.* note 26 at 679.

28. *Ibid.*

29. *Supra*, note 1 at 9.

30. *Ibid.* at 19.

31. J. Cook & S. Watt, "Racism, Women and Poverty" in C. Glendinning & J. Millar, eds. *Women and Poverty in Britain* (Brighton: Wheatsheaf Books, 1987).

32. *Ibid.* at 61.

Other studies have focused on the specific issue of the role of administrative discretion in contributing to discriminatory practices within bureaucracies. Bayefsky's study examines how, even when a governmental policy is non-discriminatory, the administrative discretion allowed in the interpretation of a policy can result in discriminatory practices.[33]

Handler discusses a number of sources of administrative discretion.[34] The need for discretion arises when there are not clearly defined, and precisely stated rules in the enabling legislation. This required administrative discretion allows for the subjective interpretation of policies by government representatives, that is, it gives them choices. As in the specific case of *Regulation 8*, if the *Family Benefits Act* provided clearly defined criteria for the application of deductions then the exercise of Ministry staff discretion would be limited. In the *Regulation 8* policy, Ministry representatives interpret the statutory language as a regulation. However, because the *Family Benefits Act* is vague, the language of the *Regulation* and the *Guidelines* is also vague, ambiguous and subject to a range of interpretations.

Handler notes that a second source of administrative discretion is the bureaucratic structure of an agency itself. Within this structure there are often conflicting goals among departments, administrators and groups of workers who have different philosophies, attitudes and perceptions. The ideological background one has, that is, the assumptions, conceptual framework, and ideas that guide social service workers in making their choices, also serves to increase the variation in outcomes of the use of administrative discretion.[35]

Thirdly, another factor that permits a broad range of discretionary choices among social service personnel is the unequal position of clients themselves. Lower income people are extremely reliant and dependent on social service programs. They perceive themselves to have little bargaining power in their relationship with bureaucratic

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33. A. Bayefsky, "The Jamaican Women Case and the Canadian Human Rights Act: Is Government Subject to the Principle of Equal Opportunity?" (Feb. 1980) U.W.O. L. Rev. at 469.

34. J. F. Handler, *Protecting the Social Service Client* (New York: Institute for Research on Poverty, Academic Press, 1979) at 8.

35. *Ibid.* at 23.

representatives. Often they lack information about programs and services which they may be entitled to or they have no knowledge of their rights to appeal procedures if services are denied. They may lack this information simply because it has been withheld from them. Given their position they are particularly vulnerable to the discretionary powers of agency officials.[36]

CONCLUSION

The *Regulation 8* policy is but one of several policies that allow for substantial administrative discretion in the provision of social assistance benefits.

The results of the *Regulation 8* study clearly indicate a need for an investigation of the application of this policy throughout Ontario. The observed discriminatory outcomes also identify a need for an examination of the whole range of discretionary decision making that is available in the delivery of social assistance programs.

The purpose for initiating the broader province wide investigation would be to determine if the same pattern of disproportionate adverse impact on racial minority women is widespread. If this were the case the Ministry would need to focus its attention on examining the sources of these discriminatory practices and undertake the appropriate remedial action.

The *Regulation 8* study was provided to the Ministry with the request that a more extensive review of the application of this policy be conducted. The Ministry did not conduct such a review but did advise of its intention to review the application of *Regulation 8* charges in the four Metro Toronto area offices.

Following almost one year of non-response by Ministry officials to repeated inquiries, representatives from the Congress of Black Women, the Coalition of Visible Minority Women, the Ontario Public Service Employees Union, and I requested the Ontario Human Rights Commission to initiate a complaint against the Ministry on behalf of affected racial minority family benefits recipients.

The Ministry's response to resulting public queries about this issue was that it had conducted its own study within the Metro Toronto area

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36. *Supra*, note 34 at 23.

and did find that the application of *Regulation 8* charges was inappropriate in the majority of the cases it reviewed. Initially, Ministry officials asserted that its study found no evidence of racial discrimination. Subsequently, these officials acknowledged that assessing the impact of these inappropriate charges upon racial minority recipients was not, in fact, a part of their study. Following its acknowledgment that no review of racial identification had been conducted, the Ministry still contended there was no evidence of systemic discrimination in the application of *Regulation 8* charges.

While the Ontario Human Rights Commission staff was initially very positive about the *Regulation 8* study forming the basis for a Commission initiated complaint, we were informed approximately nine months later that after considerable discussions among the Commissioners the Commission had decided not to initiate a complaint at this time. The reason given was that the Commission could not at the present time "commit the considerable resources such an investigation would demand."[37] The Commissioners "are developing a strategy, however, that will allow us to focus our limited resources on such priority areas in the future."[38] On a more optimistic note they indicated that the Commission intends to give serious consideration to the issues associated with racial minority women, "and in particular the concerns expressed with respect to *Regulation 8* of the *Family Benefits Act*."[39]

Since the concerns regarding the *Regulation 8* policy became public, many women in receipt of public assistance and legal advocates have become aware of the nature of such benefit deductions and have successfully challenged them. Many fieldworkers have independently conducted their own reviews, recommending removal of charges and retroactive payments for those affected.

It is my understanding that the Ministry has in the past year conducted a province wide review of *Regulation 8* cases and, in many instances, removed the charge and provided reimbursement to the recipient. Evidently the Ministry has also developed new criteria for future *Regulation 8* deductions.

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37. Letter, dated May 11, 1990, from Catherine Frazee, Chief Commissioner, Ontario Human Rights Commission, to author.

38. *Ibid.*

39. *Ibid.*